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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the Cable Television)	CS Docket No. 97-248
Consumer Protection and Competition)	
Act of 1992)	RM No. 9097
)	
Petition for Rulemaking of Ameritech)	
New Media, Inc. Regarding Development)	
of Competition and Diversity in Video)	
Programming Distribution and Carriage)	

COMMENTS OF BELL SOUTH CORPORATION,
BELL SOUTH INTERACTIVE MEDIA SERVICES, INC. AND
BELL SOUTH WIRELESS CABLE, INC.

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BELL SOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (collectively, "BellSouth") hereby submit these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

The importance of the instant proceeding should be placed in the broader context of the history and intent of the program access law. Congress enacted that law more than five years ago for the express purpose of increasing competition and diversity in the multichannel

¹ BellSouth previously supported Ameritech's Petition through its interest in Corporate Media Partners d/b/a *Americast* ("Americast"). See Comments of Americast In Support of Petition for Rulemaking of Ameritech New Media, Inc. (filed July 2, 1997).

video programming market.² Yet, the findings contained in the FCC's recently-released annual report to Congress on the state of competition in the multichannel video programming distributor ("MVPD") marketplace³ suggest that this goal has not been attained. According to the 1997 Report, approximately five years after the enactment of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and two years after the passage of the Telecommunications Act of 1996 ("1996 Act"):

- Incumbent cable systems continue to dominate the MVPD market, enjoying 87 percent market share;⁴
- Consolidation in the upstream multichannel video programming market continues at an accelerating pace, with the market share of the four largest MVPDs -- not coincidentally the four largest cable multiple system operators ("MSOs") -- increasing to 54.3 percent;⁵
- Vertical integration of programming has grown overall and proportionately remains sizable (40 percent) relative to all national satellite-delivered cable programming services;⁶ and
- Cable television rates increased sharply over the last year, at a rate of 8.5 percent.⁷

As these findings demonstrate, genuine competition has yet to develop in the vast majority of local multichannel video programming markets.⁸ However, rare pockets of effective

² See 47 U.S.C. § 548(a).

³ See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Doc. No. 97-141, FCC 97-423 (released Jan. 13, 1998) ("1997 Report").

⁴ 1997 Report at ¶ 150, Table E-1.

⁵ *Id.* at ¶ 151.

⁶ *Id.* at ¶¶ 158-59.

⁷ *Id.* at ¶ 11, Overview of Video Programming Distribution Market.

⁸ *Id.*, *Separate Statement of Chairman William E. Kennard* at 1 ("But less than 15 months away from the sunset of most cable rate regulation, it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent.").

MVPD competition have emerged, and in these locations incumbent cable operators have responded with lower rates or other pricing discounts, improved or additional program offerings, innovative technology, and better customer service.⁹ The stark contrast between the quality and price of service offerings in these rare competitive markets relative to the vast majority of multichannel video programming markets nationwide is proof enough that only true competition in the distribution of multichannel video programming will ensure a diversity of programming content, spur technological innovation, and stem the tide of rising cable rates. And in order to ensure that such competition develops, the need for Commission oversight over developments in the MVPD marketplace is more important now than ever before.

BellSouth is continuing to provide consumers alternative sources of multichannel video service. BellSouth has made extensive commitments to and is in the process of deploying both wireless and wired multichannel video technologies in direct competition with incumbent cable systems, primarily through digital wireless cable service or cable overbuilding. Like many emerging cable competitors, however, BellSouth has encountered significant difficulty in obtaining, at nondiscriminatory prices and terms, access to the popular programming packages demanded by the American viewing public. Indeed, conditions in the MVPD marketplace appear to have changed little since concern about the ability of incumbent cable operators and affiliated programming vendors to exert market power and thwart emerging competition prompted Congress in 1992 to add Section 628 to the Communications Act of 1934. Congress reasoned that alternative MVPDs stand little chance of competing against the incumbent cable

⁹ *Id.* at ¶¶ 178-210.

industry “[w]ithout fair and ready access” to programming “on a consistent, technology-neutral basis,” and concluded that “without such access, an independent entity cannot sustain itself in the market.”¹⁰ Congress therefore envisioned, and created, a regulatory framework that would constrain the anticompetitive actions of incumbent cable operators and their vertically integrated programming affiliates.

Unfortunately, new entrants remain vulnerable to competitive abuses in the MVPD marketplace today, notwithstanding that more than five years have passed since the Commission’s implementation of program access rules designed to effectuate Congressional intent and promote MVPD competition.¹¹ Having experienced such vulnerability, BellSouth believes that stricter implementation by the Commission of Section 628 can more effectively target and eliminate the vertical restraints that Congress identified as inhibiting competition in the MVPD marketplace. Because incumbent cable operators remain in a position to exert market power, and are in fact exploiting such power, the Commission must now more than ever ensure that its program access rules have teeth and effectively advance Congress’s procompetitive goals.

As explained below, BellSouth agrees with Ameritech and other parties that the Commission must strengthen the program access complaint process to ensure swift results, permit meaningful but limited discovery as a matter of course, and authorize damage awards to deter and compensate for anticompetitive behavior. Beyond these procedural modifications, however, the Commission must ensure that the substance of its program access rules continues to

¹⁰ H.Rep.No. 628, 102d Cong., 2d Sess., at 30 (1992).

¹¹ The Commission’s program access rules are set forth at 47 C.F.R. §§ 76.1000-76.1004.

respond effectively to today's fast-changing MVPD environment. In this regard, BellSouth believes not only that the Commission has the authority but that it must appropriately counteract the very real threat of evasion of program access requirements by cable operators and vertically integrated programmers.

First, the Commission should adopt a rule to specify that a staff decision on program access complaints must be rendered within 45 days of the close of the official pleading cycle (*i.e.*, the filing of plaintiff's reply). Combined with a limited right of discovery, BellSouth proposes a timeline for adjudicating program access complaints that should more effectively address the needs of emerging MVPD competitors. Establishing a concrete deadline for the disposition of program access complaints will impose necessary discipline on the parties, ensure fair settlement considerations, and fulfill Congress's mandate to expedite review of program access complaints.

Second, in all program access cases the Commission should replace its seldom-used discretionary discovery approach with a right to discovery as a matter of course limited in scope to specific programming documentation. A competitor that has been denied programming or has been the subject of discriminatory treatment often lacks access to documents that are critical for demonstrating a violation of the rules. This not only can impede the aggrieved party's ability to support its case, but also may jeopardize the fairness and accuracy of the Commission staff's decisions. Thus, BellSouth proposes modifying the rules in the following manner: (1) a program access plaintiff may serve on the Commission and the defendant, simultaneously with the complaint, a document discovery request limited to contracts and other documents that relate

to programming rates, and/or other terms and conditions of access in dispute; (2) if the defendant has no objection to the scope of the discovery request, it must produce the relevant documentation with its answer; (3) if the defendant objects to the scope of the requested materials, it must include those objections with its answer, in which case (a) within 10 days after the filing of defendant's answer, the Commission staff issues a public notice which either approves in full or narrows the scope of requested materials; and (b) 10 days thereafter the defendant must produce the documentation; and (4) plaintiff files its reply 20 days after defendant files its answer (if defendant did not object to the scope of discovery), or 10 days after defendant's production of documents (if defendant did object to the scope of discovery).

Third, imposing a damages remedy is both consistent with the Commission's authority under Section 628(3)(1) to order, without limitation, "appropriate remedies," and necessary at this time to deter and compensate for anticompetitive conduct by defendants determined to be in violation of the program access rules. MVPD competitors denied access to programming on a nondiscriminatory basis suffer tangible competitive harm, yet under current Commission practice have no means through which they can be made whole. A violator in essence reaps the monetary and competitive benefits of unlawful behavior with impunity, which in itself only encourages dilatory tactics. Although the Commission may have reasonably expected in the past that such damage awards were not necessary to promote MVPD competition (just as industry observers may have presumed that competition in the MVPD marketplace would flourish by 1998), it is now clear that program access relief should be extended to include compensatory as well as injunctive relief.

Finally, deliberate evasion of the Commission's program access rules through the migration of satellite-delivered programming to modes of terrestrial delivery is rapidly becoming a marketplace reality which, if not addressed now, will undermine even the modest competitive strides that have been achieved in the MVPD market. BellSouth believes that the Commission has both the authority and mandate to put an end to such evasive tactics before they become widespread.¹² On its face, Section 628(b) proscribes "unfair methods of competition or unfair or deceptive acts or practices, *the purpose or effect* of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."¹³ Although the statute indisputably does not prevent terrestrial distribution *per se*, if the programmer's shift from satellite to terrestrial delivery is part of an anticompetitive practice and has the "purpose or effect" of hindering or preventing an MVPD from serving its subscribers by denying those subscribers programming that is, has been, or would otherwise be satellite-delivered, then, the scenario plainly falls within Section 628(b)'s proscription. Without demurring to further legislation, the Commission can today enforce the program access law as written to counteract evasive tactics that threaten the efforts of alternative MVPDs to compete against the entrenched cable industry.

¹² As the Commission recently observed in responding to questions from House Telecommunications Subcommittee Chairman W.J. ("Billy") Tauzin, "regardless iof the method of delivery, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded." Responses to Questions, Subcommittee on Telecommunications, Trade, and Consumer Protection (Jan. 23, 1998) ("Tauzin Response").

¹³ 47 U.S.C. § 548(b) (emphasis supplied).

II. BELL SOUTH'S INTEREST IN THIS PROCEEDING

BellSouth today is pursuing an aggressive strategy of deploying wireless and wired multichannel video technologies throughout its telephone service areas in direct competition with incumbent cable operators. BellSouth has made a substantial commitment to provide digital wireless cable service in major markets throughout the southeastern United States. Specifically, BellSouth has entered into or completed agreements to acquire MDS and ITFS channel rights covering 4.5 million homes (or approximately 3.3 million line-of-sight homes) in and around several large markets in Florida, as well as Atlanta, New Orleans and Louisville.¹⁴ To date, BellSouth also has obtained cable franchises in 18 communities in Alabama, Florida, Georgia, South Carolina and Tennessee, representing a potential long-term total of almost 1.2 million cable households.¹⁵

BellSouth's investment in the MVPD industry makes sense only if the regulatory environment promotes market entry and assures fair access to multichannel video programming, which is the lifeblood of emerging MVPDs. BellSouth thus has a vital interest in this proceeding, which can and should alter the current FCC rules governing program access.

¹⁴ BellSouth launched digital wireless cable service in New Orleans during the fourth quarter of 1997, and is scheduled to launch digital wireless cable service in Atlanta, Jacksonville, Orlando, Daytona Beach and Miami/Ft. Lauderdale later this year.

¹⁵ See Comments of BellSouth, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-41 (July 23, 1997), at 7; "Cable Should Not Lose Sight of Telco Threat," *Video Technology News* (June 2, 1997).

III. DISCUSSION

A. The Commission Should Guarantee Expedited Review By Establishing A Specific Deadline For The Resolution Of All Program Access Complaints

Despite Congress's directive to the Commission to "provide for an expedited review" of program access complaints,¹⁶ the Commission's resolution of program access complaints has not reflected the urgency that Congress ascribed to program access issues. The average processing period for such cases remains, depending upon the calculation, at least eight months.¹⁷ This is not the "expedited review" that Congress envisioned, especially for new entrants which are particularly vulnerable to market power abuses in developmental stages and just prior to launch. Imposing a deadline upon the disposition of all program access complaints would guarantee swift review, which in turn would lessen the extent of a complainant's injury and foster competitive development.

When the program access complaint process is prolonged, the costs of delay are borne by competitors who are strong-armed into paying unlawfully high rates during the processing delay or denied programming altogether, and by the public, which is denied the benefits of receiving the programming via a source other than the incumbent cable system. Moreover, an injured alternative MVPD who must wait many months for Commission action is likely to succumb to settlement pressure to prevent further erosion of its competitive position.

¹⁶ See 47 U.S.C. § 548(f)(1).

¹⁷ Ameritech and other commentators calculated an average processing period of approximately 12 months, but the Commission excluded negotiated settlements and cases in which program access was raised tangentially, which resulted in an average processing time of 8.1 months. See Ameritech Petition at 8, 12-13; Americast Comments at 6; NPRM at ¶ 37.

Such a result may yield less than complete access to programming and therefore produce a weaker MVPD competitor.¹⁸

Ameritech has proposed that program access complaints in cases in which complainants have elected not to take discovery be resolved by the FCC within 90 days of the agency's receipt of a complaint.¹⁹ The limit would be 150 days for cases in which discovery is conducted.²⁰ BellSouth believes that this latter limit will still result in excessive delay, especially because most MVPD competitors seeking relief will need some form of discovery in order to support their case.

BellSouth believes that the Commission instead should adhere to a fixed time period measured from the close of the pleading cycle (*i.e.*, the filing of plaintiff's reply -- the last officially-recognized pleading) to the date the staff decision must be released. With a limited discovery right integrated into the pleading process (discussed further below), BellSouth believes that a single, 45-day time limit on resolution of the complaint should generally suffice for all program access complaints. A 45-day decision period will guarantee "expedited review" of program access complaints without unduly straining Commission resources. Moreover, swift

¹⁸ Indeed, in ordering expeditious processing of program access complaints, Congress foresaw the tangible harms that delay would cause new entrants:

The bill provides for an expedited administrative remedy The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.

S. Rep. No. 92, 102d Cong., 1st Sess. at 22-23.

¹⁹ NPRM at ¶6.

²⁰ *Id.*

and certain resolution of program access violations, regardless of whether discovery is conducted, will send the message to would-be violators that Congress intended: that there will be zero tolerance for anticompetitive behavior that deprives alternative MVPD competitors of access to vital programming.

B. The Commission Should Institute A Limited Right To Discovery To Ensure A Fair And Accurate Program Access Complaint Process

An MVPD competitor often faces the inherent disadvantage of lacking access to the information needed to support its case, particularly in cases of price discrimination. Critical programming documents usually are in the exclusive possession of incumbent cable operators or program vendors closely aligned with cable interests. Congress foresaw the need for program access defendants to divulge relevant documentation and directed the Commission to establish procedures to collect such data, “including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate” program access rules.²¹ The Commission’s implementing rules therefore should operate to eliminate the inherent procedural bias in favor of program access defendants.

Current Commission practice falls short of achieving this intended result. Under the current rules, discovery is not permitted routinely in program access cases, but only at the discretion of Commission staff.²² When the Commission initially promulgated its program access rules, it suggested that discovery would be readily available when necessary to assist aggrieved parties suffering an informational handicap:

²¹ 47 U.S.C. § 548(f)(2).

²² 47 C.F.R. § 76.1003(g)(1) (“staff may in its discretion order discovery”).

[I]f the staff determines that the complainant has established a *prima facie* case, and further information is necessary to resolve the complaint. . . , the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously.²³

Notwithstanding this conceptual right to discovery, however, in practice the Commission staff has sparingly used its discretion to order discovery.²⁴

BellSouth believes that the program access complaint process would be strengthened by affording a plaintiff the right to obtain documentation relevant and necessary to support its case against an incumbent cable operator or vertically integrated programmer that is denying access to, or charging inflated prices for, crucial programming. Production and review of the relevant materials as a matter of course would also aid the Commission staff in reaching the fairest and most accurate resolution of the issues raised in the complaint, streamline procedural wrangling over discovery issues, and allow the staff to focus on the merits of the complaint from the outset. BellSouth therefore does not agree with the Commission's tentative conclusion in the NPRM that the current system of Commission-controlled discovery is adequate.

On the other hand, BellSouth also believes that full-blown discovery will often prove excessive and unnecessary, and could contribute to costly delay in the disposition of a

²³ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-256, 8 FCC Rcd 3359, 3420-21 (1993) ("*Program Access Order*").

²⁴ The Commission staff has apparently required a defendant to provide additional information in the course of considering a program access case only in two price discrimination cases. *See* NPRM at ¶ 44 n.125.

complaint. A rule that imposes a right of discovery limited to contracts and documentation concerning programming rates, and/or other terms and conditions of access strikes the appropriate balance. The rule, of course, should permit leeway if the Commission staff believes, or if a complainant demonstrates, that further discovery is required because of unique circumstances. However, provided that complainants are permitted a right to discovery limited in scope as a matter of course, BellSouth believes that full-blown discovery will rarely be warranted.

To accomplish the dual objectives of expeditious disposition and limited discovery, the Commission should modify its rules to require that an MVPD competitor file a discovery request in tandem with its program access complaint (if discovery is desired). The discovery request should be limited to contracts and other documents that relate to programming rates, and/or other terms and conditions of access in dispute, unless the complainant believes that the unique circumstances of the particular dispute warrant additional discovery.²⁵

As provided in the current rules, the defendant would file its answer to the complaint within 30 days of the complaint's filing. The defendant must at that point serve upon the plaintiff and the Commission its objection(s), if any, to the scope of the discovery request. If the defendant does not object to the scope of discovery and produces the documents with its answer (or if plaintiff requests no discovery in the first instance), then the plaintiff would file its

²⁵ The staff should assess requests for additional discovery in exceptional cases under a necessity standard much like the standard employed today in 47 C.F.R. § 76.1003(g)(1). In no event should additional discovery be permitted to delay the resolution of the complaint process beyond 120 days from the time the complaint is filed.

reply 20 days later, just as the current rules require, and the Commission would render its decision within 45 days thereafter.

If, as may be more likely, the defendant objects to the scope of the discovery request, then the Commission staff should have a brief period of time following the defendant's answer in which to review the *scope* of the discovery request (but not the *entitlement* to discovery). BellSouth proposes 10 days for this purpose, to run during the course of the pleading cycle. Giving the Commission staff this limited review function should adequately guard against the concern that improper or frivolous complaints may be filed for the purpose of "fishing" for sensitive commercial information.²⁶ If within this 10-day period the Commission staff determines that a particular document request exceeds what would reasonably be deemed related to programming rates, and/or other terms and conditions of access, the Commission would issue a public notice to that effect and narrow the request. On the other hand, if all materials identified appear relevant to the dispute, the Commission would issue a public notice approving the scope of the plaintiff's discovery request. The public notice either approving or narrowing the scope of discovery would then trigger the defendant's obligation to produce the requested materials within 10 days after the public notice.²⁷ This time frame thus grants a defendant that objected to the

²⁶ Of course, the staff should assess the merits of the complaint and answer in any event to ensure that the program access plaintiff has stated a *prima facie* case; if not, the complaint should be promptly dismissed within ten days of the defendant's answer. If warranted, the Commission could then impose sanctions for the filing of a frivolous complaint. See 47 C.F.R. § 76.1003(q).

²⁷ The Commission can and should ensure that confidentiality procedures are in place to protect proprietary information. BellSouth believes that the Commission's draft standardized protective order, attached as Appendix A to the NPRM, adequately safeguards any sensitive or proprietary information included in the discoverable documents.

scope of discovery 50 days from the date on which the plaintiff served its limited document discovery request to assemble the requested materials -- a period of time that should prove more than adequate for all program access cases.

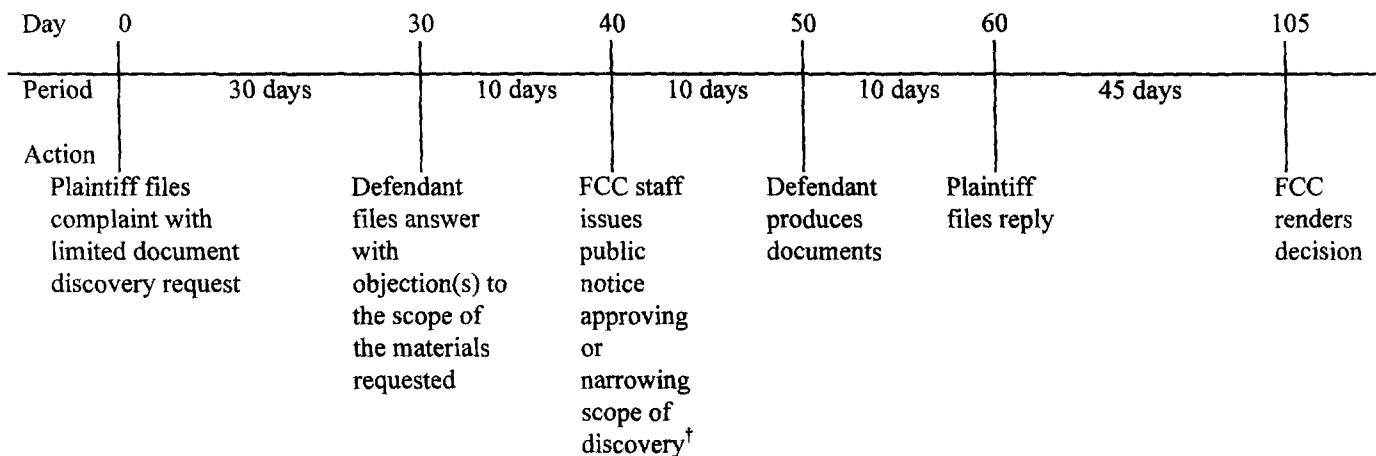
With limited discovery integrated into the pleading process, the Commission should not shorten either the answer or reply pleading period as Ameritech has proposed. Instead the Commission should retain the 30-day answer period and extend the reply period by 10 days to enable the plaintiff MVPD to incorporate discovered facts into its reply. At the conclusion of this proposed pleading cycle (30 days for answer and reply), both sides will have been afforded an opportunity to incorporate pertinent facts drawn from the relevant documentation into a regular filing with the Commission.

Because the limited right to discovery proposed under this framework is both explicit and mandatory, with the Commission staff's role focused on evaluating the proper scope of discovery, it certainly will not add to, and in practice will probably lessen, administrative demands on Commission staff. Moreover, parties can be assured that at a definite point in the pleading process, at most 20 days following the filing of the answer, both sides will have obtained access to the documentation that forms the basis of the dispute. In this way, presumptively permitting limited discovery of essential documents eases the inherent structural informational imbalance that defendants can otherwise exploit in today's program access environment.

BellSouth's Proposed Timeline

Bringing together the discovery and complaint resolution deadlines discussed above, the program access complaint process proposed herein is outlined in the following timelines:

Objection Track:

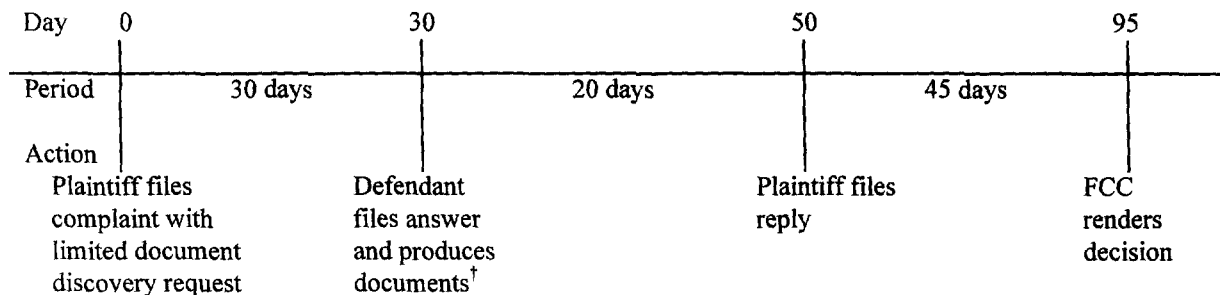


BellSouth expects that the above process would apply for nearly all program access complaints, regardless of the type of discrimination alleged.

In cases where a program access defendant does not object to the discovery request, but instead produces the documents with its answer (or where a plaintiff does not request discovery at all), there is no need to alter the reply pleading cycle. The timeline thus would be as follows:

[†] Commission may dismiss complaint within 10 days of answer if plaintiff has failed to plead a *prima facie* case.

No Objection Track:



C. The Commission Should Make Damages Available To Compensate For Competitive Harm And To Deter Anticompetitive And Dilatory Behavior

The Commission currently has authority to award damages for violations of its program access rules. Section 628(e)(1) grants the Commission unbounded authority “to order appropriate remedies including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.”²⁸ No language suggests any limit on the arsenal of remedies the Commission can order. Accordingly, the Commission correctly has determined that it has the power to remedy program access violations by awarding relief in the form of compensatory damages.²⁹

Nonetheless, the Commission’s current rules do not permit monetary damages against cable operators or vertically integrated programmers that have been found liable for a program access violation. This omission effectively rewards anticompetitive behavior since

²⁸ 47 U.S.C. § 548(e)(1).

²⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 1902, 1905, 1910-11 (1994) (“*First Reconsideration Order*”).

prospective compliance with a Commission order to make programming available does little to compensate for damage already incurred as a result of the denial of fair access to programming.

Given that the Commission has the power to award damages, it should expressly amend its rules to permit program access plaintiffs to recover them. The Commission's 1994 finding that a damages remedy was not necessary in program access proceedings was undoubtedly based in part upon an expectation that competition would quickly take root in the MVPD market to constrict anticompetitive activity by cable operators and their affiliates. Such competition has yet to materialize, however, and empirical evidence of anticompetitive behavior in the marketplace and its detrimental effects upon aggrieved providers, as noted above, has been brought repeatedly before the Commission.³⁰ BellSouth does not believe that the current rules have adequately deterred such behavior.

The Commission should institute, by specific rule, a damages remedy to compensate aggrieved parties for harm caused by a violation of the program access rules. A finding of liability amounts to a determination that a competitor was denied access to programming, or to fair prices and terms for the purchase of such programming for a particular period of time. An award of damages will compensate the aggrieved party for its inability to obtain programming on a nondiscriminatory basis from the violator during that time. The threat of an accumulating damage award also will likely induce a potential violator to comply with the rules and resolve or settle the dispute quickly in order to reduce its damages exposure. The

³⁰ See, e.g., *Corporate Media Partners v. Rainbow Programming Holdings*, Memorandum Opinion and Order, File No. CSR-4873-P, DA 2040 (released Sept. 23, 1997); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc.*, Memorandum Opinion and Order, File No. CSR-4983-P (released July 11, 1997) ("Bell Atlantic Order").

imposition of damages in this context complements the damages relief the Commission has made available for violations of nondiscrimination requirements in other services.³¹

BellSouth believes that damages should be calculated on a case-by-case basis from the date upon which the program access violation is deemed to have first occurred (*i.e.*, the date upon which the vendor enters into a contract or makes an offer that violates the program access law or the date upon which the vendor first refuses to sell) through the date upon which the Commission's finding of liability is made, plus interest. BellSouth also sees no reason why the issues of liability and sanctions cannot be bifurcated if necessary, and prospective injunctive relief granted to order access to the disputed programming within 45 days after the close of the pleading cycle.³²

D. The Commission Has The Authority And Responsibility To Address Evasion Of Program Access Rules Through Terrestrial Delivery

No longer an abstract principle entertained by the cable industry, "terrestrial evasion" rapidly is becoming a marketplace reality that could gut the effectiveness of the program access law and undermine progress made thus far in developing alternatives to

³¹ See Section 202 (imposing fines for certain unjust or unreasonable discrimination by a common carrier); Section 206 (requiring a common carrier to pay damages to persons injured by its unjust or unreasonable discrimination); Section 209 (permitting damages award against a common carrier for discriminatory practices).

³² Of course, any damages remedy imposed by the Commission would be "in addition to and not in lieu of the remedies available under Title V or any other provision of the Act." See 47 U.S.C. § 548(e)(2). Title V, which permits forfeitures for willful violations of any rule or regulation imposed by the Commission, serves as an additional deterrent to program access violations, and sufficiently addresses the types of concerns that otherwise might make punitive damages appropriate. BellSouth agrees with the Commission's tentative conclusion that persuasive evidence for imposing punitive damages has not been demonstrated.

incumbent cable systems. When a cable operator or vertically-integrated programming vendor migrates programming to terrestrial distribution for the purpose of evading the Commission's program access requirements, the Commission has both the legal authority and the responsibility to respond appropriately to such tactics.

The terrestrial evasion problem is particularly pressing because evasion strategies are materializing in the realm of regional sports programming, long considered essential to an alternative MVPD's competitiveness. As acknowledged in the Commission's 1997 Report, cable companies are in the process of buying into regional sports teams and venues;³³ they are then causing regional sports programming previously delivered by satellite to be re-packaged as terrestrial-delivered regional sports networks and sold only to select MVPDs. For example, Cablevision founder Chuck Dolan has announced plans to launch a fiber-based version of Cablevision's popular satellite-delivered New York SportsChannel. Cablevision intent is to offer this terrestrially-delivered network to cable operators on an exclusive basis.³⁴

Similarly, after purchasing the Philadelphia 76ers basketball team, two Philadelphia hockey teams (Flyers and Phantoms), and two major Philadelphia sports arenas, Comcast launched a new regional Philadelphia sports cable network, Comcast SportsNet, which Comcast is distributing via terrestrial means exclusively to cable operators or other select

³³ The Commission's 1997 Report recognized industry "concern that ownership of regional sports programming is becoming increasingly consolidated with cable MSOs and other significant media interests." *1997 Report* at ¶ 167.

³⁴ *Satellite Business News* (Oct. 8, 1997), at 3; *see* *Tauzin Response* at 6.

terrestrially-based MVPDs.³⁵ Comcast SportsNet essentially replaced the former satellite-delivered SportsChannel Philadelphia. In a recent interview, Brian Roberts, the President of Comcast Corporation, concisely summarized the motives behind the formation of Comcast SportsNet:

Comcast's purchase of the Philadelphia Flyers, 76ers, and Phantoms inspired the company to start up a regional sports network, which debuts this month as a basic cable-service channel. The question now is whether Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act [sic] in order to lock up the Philly area's sports programming. *"We don't like to use the words 'corner the market,' because the government watches our behavior,"* Roberts says with a laugh. *"Let's just say we've been able to do things before they're in vogue."*³⁶

Mr. Robert's statement indicates that Comcast's motivation is to control access to Philadelphia-area sports programming and to singlehandedly dictate the prices, terms and conditions that alternative MVPDs must accept in order to carry Philadelphia regional sports programming.

The evasion of program access requirements through terrestrial distribution has the potential to be a paramount obstacle standing in the way of MVPD competition, and it is happening today.³⁷ BellSouth would welcome any legislative efforts to clarify that the program

³⁵ See *DIRECTV, Inc. v. Comcast Corporation, Comcast-Spectacor, L.P. and Comcast SportsNet*, File No. CSR-5112-P (filed September 23, 1997) (complaining that Comcast has unlawfully withheld Comcast SportsNet from DBS providers).

³⁶ *The New Establishment -- Vanity Fair's Fifty Leaders of the Information Age*, Vanity Fair, October 1997, at 166 (emphasis supplied).

³⁷ While terrestrial evasion strategies logically have begun with regional sports programming, the Commission's 1997 Report observes that the clustering of cable systems to create regions of contiguous cable systems has continued, and the trend is for "clusters to be increasing in size." 1997 Report at ¶ 84. There is no reason that cable operators could not eventually use terrestrial delivery to withhold even the most desirable national programming from competing MVPDs if such expansion continues. Such behavior would result in the total evisceration of program

access law applies to programming controlled by entities with market power irrespective of the delivery mode. In the meantime, however, the Commission need not defer to Congress in order to act upon evasion in many situations. The Communication Act's program access provisions on their face provide explicit authority for the Commission to address terrestrial evasion in cases where programming previously has been or otherwise would be delivered by satellite.³⁸ As both a legal and policy matter, such evasion violates the requirements of Section 628.

The Commission itself specifically has suggested that a Section 628(b) complaint is the appropriate mechanism for it to address "conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."³⁹ Section 628(b), a broad prohibition on unfair competitive practices by cable operators and their vertically integrated programming affiliates, states:

It shall be unlawful for a cable operator, [or] a satellite cable programming vendor in which the cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.⁴⁰

Terrestrial evasion meets all of the elements of this statutory prohibition. In such cases, (i) a cable operator or its associated satellite cable programming vendor (ii) has unfairly

access requirements.

³⁸ See 47 U.S.C. § 548(b).

³⁹ See *OVS Second Report and Order*, 11 FCC Rcd 18223, 18325 n. 451.

⁴⁰ 47 U.S.C. § 548(b).

refused to provide an MVPD competitor nondiscriminatory access to programming that it has made available to cable operators or another class of MVPDs, (iii) the purpose *or* effect of which is to hinder significantly or to prevent that MVPD from providing satellite cable programming to its subscribers.⁴¹ The anticompetitive conduct arises not from the mere use of an exclusively terrestrial delivery mode, but rather from the intentional migration of satellite-delivered programming to terrestrial facilities (or purposeful bypass of satellite-delivery in the first instance) to deny MVPD competitors access to programming without any legitimate business justification. Such a refusal to sell is exactly the type of “unfair practice” proscribed in Section 628(b).⁴²

BellSouth accepts the observation that Section 628 generally is focused on ensuring access to “satellite cable programming.”⁴³ But that observation does not preclude application of Section 628(b) in all appropriate cases. Cable operators are indisputably subject to Section 628(b) for their anticompetitive *actions* that have the “purpose or effect” of denying -- or of taking away -- a competitor’s access to satellite-delivered programming. The Commission can

⁴¹ See 47 U.S.C. § 548(b). Section 628 is written in the disjunctive (applying on the basis of “purpose *or* effect”); BellSouth therefore does not comprehend the Commission’s attempt to read the word “effect” out of the statute. See NPRM at ¶ 51.

⁴² See *Program Access Order*, 8 FCC Rcd. at 3412 ¶ 116 (suggesting that a vendor’s unreasonable refusal “to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor’s competitor” are each forms of impermissible non-price discrimination); *OVS Second Report and Order*, 11 FCC Rcd. at 18324, ¶ 194 (refusal to sell is “unreasonable” if it “discriminates against a class of distributors”); *Bell Atlantic Order* at ¶¶ 5, 17-18, 24-25.

⁴³ See NPRM, Separate Statement of Commissioner Harold W. Furchtgott-Roth.